

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the preliminary hearing record and considering the briefs of the parties, the Appeals Board finds as follows:

On September 29, 1998, claimant was involved in a motor vehicle accident while driving his personal pickup truck. The accident occurred while claimant was driving north on Ninth Street in Salina, Kansas, at about 11:50 a.m. Claimant's pickup truck was hit head on by a southbound vehicle that was rear ended and pushed into claimant's northbound lane.

Claimant sustained severe injuries to his right leg, left wrist, chest, and lungs. He was transported to Asbury-Salina Regional Medical Center where he had to undergo surgical treatment for his severe injuries.

On the day of the accident, claimant was employed by respondent as a truck driver. His employment responsibilities included delivery of heavy equipment and helping assemble the heavy equipment at the job site. Claimant was also responsible for some maintenance on his truck and on occasion, ran errands for the respondent that included obtaining repair parts.

On the morning of the accident, claimant testified he had delivered a crane to a customer at a job site. At approximately 11:20 a.m., he returned to respondent's place of business. He was then instructed to pickup some booms for a crane at a welding shop located in south Salina, Kansas. But before he went after the booms, he had to go to a parts shop located in north Salina, Kansas, to pickup some clamps. Claimant contends the clamps were needed to repair a defective exhaust system located in respondent's Peterbilt tractor/trailer that claimant was assigned to drive.

Claimant testified he used his own personal pickup truck to go after the clamps. Claimant also testified he was going to pickup lunch either before he picked up the clamps at the parts store or after he picked up the clamps. Claimant testified he was not going to take a lunch hour that day. He was going to pickup lunch at McDonald's and eat lunch as he was driving. The claimant left respondent's business at approximately 11:40 a.m. and was involved in the motor vehicle accident at approximately 11:50 a.m.

Respondent's owner, Dennis Russell, also testified before the Administrative Law Judge at the preliminary hearing. He testified claimant was not on a business errand at the time of the motor vehicle accident. Mr. Russell contended claimant was on his unpaid personal lunch hour when the accident occurred. Mr. Russell also claims that the Peterbilt truck claimant was assigned to drive did not have an exhaust leak. Additionally, Mr. Russell testified claimant had available company vehicles to drive for business errands and did not need to drive his personal truck.

Mr. Russell also testified claimant had not delivered a crane the morning of the accident. In fact, claimant was finishing up chaining down the crane to his truck when Mr. Russell left the business about 11:00 a.m. Mr. Russell was claimant's direct supervisor and did not instruct claimant to pickup some clamps.

Mr. Russell further establishes that the only time respondent's employees were paid for their lunch hour was when they picked up lunch and ate the lunch on either the way to a job or from a job. Anytime the employees were working at the respondent business location, left for lunch and returned, they were not paid for their time at lunch or going to and from lunch.

As noted above, there is conflicting testimony from the two witnesses that testified before the Administrative Law Judge at the preliminary hearing. In finding the injuries that claimant sustained in the motor vehicle accident were not related to his work for respondent, the Administrative Law Judge simply did not believe claimant's testimony. The Administrative Law Judge did believe respondent's owner when he testified that claimant's truck did not have a defective exhaust system and therefore did not need clamps. At this juncture of the proceeding, because the Administrative Law Judge had to opportunity observe the witnesses' in-person testimony, the Appeals Board finds some deference should be given to the Administrative Law Judge's conclusions. Therefore, giving some deference to the Administrative Law Judge, the Appeals Board finds that the Administrative Law Judge's preliminary hearing Order should be affirmed.

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that Administrative Law Judge Bruce E. Moore's June 2, 1999, preliminary hearing Order should be, and is hereby, affirmed in all respects.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of August 1999.

---

BOARD MEMBER

c: Brian D. Pistotnik, Wichita, KS  
Anton C. Andersen, Kansas City, KS  
Bruce E. Moore, Administrative Law Judge  
Philip S. Harness, Director